



The Comptroller General
of the United States

Washington, D.C. 20548

Glass

Decision

Matter of: Physio Control Corporation

File: B-234559; B-234559.2

Date: June 26, 1989

DIGEST

Protest that agency improperly accepted duplicate copy of awardee's best and final offer (BAFO) which agency lost is denied where BAFO was timely received and its prices independently verified by the agency and where record indicates that agency request for duplicate BAFO was harmless and did not prejudice other offerors.

DECISION

Physio Control Corporation protests the award of a contract to Medical Research Laboratories (MRL) under request for proposals (RFP) No. DLA120-88-R-1042, issued by the Defense Personnel Support Center (DPSC) for 150 battery-operated defibrillator/monitor systems.^{1/} Physio contends that the agency, after the date set for receipt of best and final offers (BAFOs), improperly allowed MRL to submit a copy of its BAFO to replace the original BAFO which was lost by the agency.

We deny the protest.

The solicitation was issued on July 26, 1988, and, as amended, stated that the government contemplated a 1-year requirements contract with an option to extend for 2 additional years. Award was to be made to the low technically acceptable offeror.

The agency received six offers in response to the solicitation by the August 25 closing date for receipt of initial offers. MRL submitted the lowest priced initial offer of \$3,490 per unit and a total price of \$523,500. Physio was

^{1/} The item is a cardiac care system for use on patients experiencing cardiac crisis and for examining the electrical activity of the heart, with a means to produce a permanent record of heart activity.

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second low with a unit price of \$3,499 and a total price of \$524,850. Following an initial round of discussions, four offers, including MRL's, were determined to be technically acceptable. Another offer became acceptable after further discussions. On November 16, the agency requested the five technically acceptable offerors to submit BAFOs by November 29, 3 p.m., local time.

On December 5, BAFOs from four of the five offerors were recorded as having been received on November 29. The abstract of offers did not indicate that a BAFO was received from MRL. A contemporary agency delivery record indicates that a document package from MRL, sent by Federal Express, arrived at the DPSC installation at 8:30 a.m., November 29. The contracting officer reports that at mid-morning on November 29, prior to the time set for receipt of BAFOs, a package from MRL was delivered to him in the presence of the contract specialist. The contracting officer opened it, and he and the contract specialist noticed that it was MRL's BAFO and that MRL "had lowered its price." The contracting officer then immediately carried the BAFO and placed it on the bid officer's desk. However, when the offers were delivered to the contracting officer on December 5, MRL's BAFO was missing. On December 9, MRL was asked to submit a copy of its BAFO although it was not told that its BAFO had been lost. This duplicate BAFO was subsequently received and was used in the final evaluation of MRL's offer. MRL, in its duplicate BAFO, reduced its price from its initial offer to \$3,379 per unit. In its BAFO, Physio, again the second low offeror, increased its price to \$4,446 per unit. Award was made to MRL as the low technically acceptable offeror on February 13, 1989. This protest followed.

Physio argues that MRL's BAFO should have been rejected as late. Physio also contends that the duplicate BAFO cannot be considered for award since there is no assurance that the duplicate BAFO submitted by MRL is the same BAFO that was subsequently lost by the agency.^{2/} We disagree.

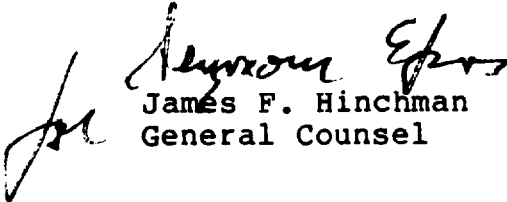
^{2/} Physio also argues that MRL is ineligible for award because it is enjoined from manufacturing and introducing into interstate commerce its defibrillator by a "consent decree of permanent injunction" issued by a federal district court, until MRL conforms to good manufacturing practices (GMP) as certified by the Food and Drug Administration (FDA). The record establishes that, prior to award to MRL, the FDA found that MRL was in compliance and could resume production and distribution of products that had been suspended. In any event, the protester does not allege bad

(continued...)

We think, contrary to the protester's assertions, that MRL's original BAFO was timely delivered to the contracting officer prior to closing and was only lost thereafter. In our view, the issue is whether the agency can properly accept the duplicate BAFO without compromising the integrity of the competitive system. As the protester argues, when the government loses a contractor's bid or offer, there generally are severe limits on the agency's ability to permit the late submissions of a duplicate. See generally Interstate Diesel Service, Inc.--Reconsideration, B-229622.2, Apr. 29, 1988, 88-1 CPD ¶ 426; Smoke Busters, B-219458, Nov. 1, 1985, 85-2 CPD ¶ 501; Hewitt Tool & Die, B-213767, Mar. 26, 1984, 84-1 CPD ¶ 349. However, we think the circumstances of this case fall within the narrow exception permitting acceptance of an otherwise late duplicate offer where the record clearly and convincingly establishes that the duplicate is identical to the original offer and that the integrity of the competitive system will not be compromised by acceptance of the duplicate offer. See 50 Comp. Gen. 325 (1970).

Here, the record shows that MRL timely submitted a BAFO that lowered its price below that in MRL's original proposal. The contracting officer and contracting specialist both confirmed this fact. Thus, the government had independent confirmation that MRL had submitted the lowest priced BAFO. Since MRL's price in its original and duplicate BAFO was low, we think the possibility that MRL altered its duplicate BAFO to the prejudice of other offerors is too remote to warrant our concern that the integrity of the competitive system has been compromised. Rather, the agency simply obtained a duplicate BAFO under circumstances that were harmless.

We deny the protest.


James F. Hinchman
General Counsel

2/(...continued)

faith or fraud on the part of procuring officials in determining that MRL was a responsible prospective contractor. We therefore will not review this matter. See 4 C.F.R. § 21.3(m)(5) (1988).